

No.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HOLLYWOOD PREMIERE, a corporation,
Bankrupt.

JOSEPH S. HERBERT & Co., a copartnership,
Appellant.

vs.

J. H. MAGID, Superseded Assignee for the Benefit of
Creditors,
Appellee.

APPELLANT'S BRIEF.

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I.

<p>Neither the District Court of the United States sitting in bankruptcy nor its referee in bankruptcy has any jurisdiction (summary or otherwise): (1) over the subject matter of a petition, filed in a bankruptcy proceeding of his assignor, by a superseded assignee for the benefit of creditors to recover moneys from persons who contracted with and received payments from said assignee prior to the institution of the bankruptcy proceeding against the assignee's assignor, or (2) over the third person (appellant) with whom the assignee had, prior to the institution of the bankruptcy proceeding, contracted and to whom said assignee made payment for services performed and paid for prior to the institution of the bankruptcy proceedings of the assignor under a petition seeking to recover for the assignor's bankrupt estate a portion of the moneys so paid by the assignee as allegedly in excesss of the reasonable value of the services performed, the payment being in accordance with the contract between the assignee and said third person.....</p>	7
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Appellee.

APPELLANT'S BRIEF.

*To the Honorable, the United States Court of Appeals for
the Ninth Circuit, and to the Honorable Chief Justice
and Associate Justices Thereof:*

The Petitioner, Joseph S. Herbert & Co., presents this
its Appellant's Brief, and respectfully represents:

Statement of Facts Disclosing Basis for Jurisdiction.

This Appeal is before this Honorable Court upon an
Order of this Honorable Court granting Appellant leave
to appeal from an Order, made on or about March 15,

1955, of the United States District Court for the Southern District of California, Central Division, the Honorable Leon R. Yankwich, Judge thereof, affirming an Order of the Referee in Bankruptcy, the Honorable Reuben G. Hunt, made on August 2, 1954, in the above entitled cause made upon the Petition filed In the Matter of Hollywood Premiere, a Bankrupt, by J. H. Magid, a Superseded Assignee for the Benefit of Creditors, overruling the objection of Appellant to the summary jurisdiction of the Referee and ordering Appellant to pay to the Trustee in Bankruptcy herein the sum of Four Hundred Six and 21/100 Dollars (\$406.21), and adopting the findings of the Referee as the findings of the Court.

The statutory authority for the jurisdiction of this Court is set forth in Section 24(a) of the Bankruptcy Act as amended (11 U. S. C. A., Sec. 47(a)).

Statement of the Case.

Involuntary Bankruptcy Proceedings in the matter of Hollywood Premiere, a corporation, Bankrupt, were commenced in the District Court of the United States for the Southern District of California, Central Division, on October 7, 1952. An adjudication was had on October 27, 1952, and E. A. Lynch was duly and regularly elected, appointed and qualified as Trustee in Bankruptcy on November 25, 1952. [Tr. of Rec. p. 1, lines 1-13.]

Prior thereto, on June 28, 1952, the Appellee, J. H. Magid, became the common law Assignee for the Benefit of Creditors of the said Hollywood Premiere, not then a Bankrupt. (*Brainard v. Fitzgerald*, 3 Cal. 2d 157, 44 P. 2d 336 (1935).) [Tr. of Rec. p. 1, lines 14-16.] Magid thereupon commenced to act as Assignee.

On July 1, 1952, the Assignee (now the Appellee) employed the Appellant, Joseph S. Herbert & Co., a co-partnership of Certified Public Accountants, to make an independent audit of the books and records of the Assignor, Hollywood Premiere. The services of Appellant were completed on or about July 30, 1952, and its statement for professional services rendered was delivered to the Assignee on or about July 31, 1952. Pursuant thereto, the Appellant was paid by said Assignee, prior to the filing of the Involuntary Petition in Bankruptcy of the Assignee's Assignor, the sum of One Thousand Eight Hundred Fifty and 66/100 Dollars (\$1,850.66).

On June 4, 1953, Assignee filed his Report and Account. On September 28, 1953, the Trustee filed his "Petition for Hearing to Consider the Assignee's Report and Account." [Tr. of Rec. p. 1, lines 23-26.] The Assignee subsequently filed his "Answer" to the Trustee's request for details as to certain expenses. [Tr. of Rec. p. 2, lines 2-5.] On December 4, 1953, on a hearing of the Assignee's account, the Honorable Reuben G. Hunt presiding, in the above entitled Bankruptcy, the Referee surcharged the Assignee in the sum of Eight Hundred Forty-six and 22/100 Dollars (\$846.22) for payment of expenses to certain parties, including the sum of Four Hundred Six and 21/100 Dollars (\$406.21) paid to Appellant prior to the Bankruptcy of said Hollywood Premiere for the aforesaid services rendered by and paid for to Appellant prior to Bankruptcy. Appellant was not a party to that proceeding. [Tr. of Rec. p. 7, line 9, to p. 8, line 26; p. 14, lines 12-25; p. 13, lines 1-21; p. 17, lines 15-20; p. 18, line 12.]

The disputes now before this Court commenced on January 3, 1954, when Appellee filed his "Petition *re*

Accountant's Fee" in the Bankruptcy Proceeding, and before the same Referee, for an Order directing Appellant to repay this Estate the said sum of Four Hundred Six and 21/100 Dollars (\$406.21) for which said Assignee had been surcharged. [Tr. of Rec. pp. 19-20.] An Order to Show Cause was issued by the said and same Referee in Bankruptcy on January 4, 1954, ordering Appellant to show cause why the Appellee's Petition should not be granted. [Tr. of Rec. pp. 21-22.]

Appellant filed and made a special appearance objecting to the jurisdiction, summary and otherwise, of the Court to hear and determine Appellee's Petition. [Tr. of Rec. pp. 23-25.] A hearing was had on the objections of Appellant to and the issue of jurisdiction was heard on January 12, 1954, before the Honorable Reuben G. Hunt (the same Referee who surcharged the Assignee). By his "Memorandum Opinion and Order" dated February 1, 1954, the Referee overruled the objections of Appellant to the Court's and Referee's jurisdiction and gave Appellant time to answer on the merits. [Tr. of Rec. pp. 26-29.] A hearing on the merits was had on April 22, 1953, at which time the objections to jurisdiction were again made by Appellant and again denied. Upon evidence being received on the merits the Referee again overruled the objection of Appellant to the jurisdiction, summary or otherwise, of the said Court and ordered the preparation of Findings of Fact and Conclusions of Law, which he signed on August 2, 1954, against Appellant and in favor of the Trustee in Bankruptcy, E. A. Lynch,

in the sum of Four Hundred Six and 21/100 Dollars (\$406.21). [Tr. of Rec. pp. 30-35.]

On August 13, 1954, Appellant filed his Petition for Review of said Order. [Tr. of Rec. pp. 36-41.] The "Certificate on Review of the Referee's Orders relating to a refund to J. H. Magid, Assignee for the Benefit of Creditors, of money held excessively paid by the Assignee to Joseph S. Herbert & Co., Certified Public Accountants," was filed on August 16, 1954. [Tr. of Rec. pp. 42-45.]

The Petition for Review came on for hearing before the Honorable Leon R. Yankwich, Judge of the District Court of United States, Southern District of California, on the 14th day of March, 1955. The Court adopted the Findings of Fact and Conclusions of Law and affirmed the Order of the Referee against Appellant. [Tr. of Rec. pp. 68-69.]

Thereafter, Appellant petitioned this Honorable Court for leave to appeal from said Order of the said District Court affirming the Order of the Referee. A transcript of the record of the above entitled matter and a brief in support of the said Petition were filed with this Honorable Court, and are incorporated herein as though set forth in full. After due notice and oral argument in support of the said Petition, this Honorable Court made its Order granting Appellant leave to appeal from the said Order of the District Court affirming the Order of the Referee in Bankruptcy in the above entitled cause as aforesaid. This brief is filed in support of said appeal.

Specification of Error Relied Upon by Appellant.

Neither the District Court of the United States for the Southern District of California, in Bankruptcy, nor the Referee in Bankruptcy thereof had any jurisdiction, summary or otherwise:

(1) Over the subject matter of a Petition filed in a Bankruptcy proceeding of his Assignor by a Superseded Assignee for the Benefit of Creditors to recover moneys from persons who contracted with and received payment from said Assignee prior to the institution of any Bankruptcy proceedings against said Assignee's Assignor; or

(2) Over a Third Person (Appellant) with whom the Assignee had prior to the institution of Bankruptcy proceedings contracted with and to whom said Assignee made payment for said services, said services having been performed and paid for prior to the institution by the Assignor of Bankruptcy proceedings, under a Petition filed by the Assignee in the Bankruptcy proceeding of the Assignor seeking to recover for the Assignor's Bankrupt Estate a portion of the moneys so paid by the Assignee as allegedly in excess of the reasonable value of the services performed, the payment having been in accordance with the Contract between the Assignee and said Third Person.

Therefore, the Orders of the District Court and of its Referee in Bankruptcy are contrary to law and should be reversed.

POINTS AND AUTHORITIES.

I.

Neither the District Court of the United States Sitting in Bankruptcy nor Its Referee in Bankruptcy Has Any Jurisdiction (Summary or Otherwise): (1) Over the Subject Matter of a Petition, Filed in a Bankruptcy Proceeding of His Assignor, by a Superseded Assignee for the Benefit of Creditors to Recover Moneys From Persons Who Contracted With and Received Payments From Said Assignee Prior to the Institution of the Bankruptcy Proceeding Against the Assignee's Assignor, or (2) Over the Third Person (Appellant) With Whom the Assignee Had, Prior to the Institution of the Bankruptcy Proceeding, Contracted and to Whom Said Assignee Made Payment for Services Performed and Paid for Prior to the Institution of the Bankruptcy Proceedings of the Assignor Under a Petition Seeking to Recover for the Assignor's Bankrupt Estate a portion of the Moneys so Paid by the Assignee as Allegedly in Excess of the Reasonable Value of the Services Performed, the Payment Being in Accordance With the Contract Between the Assignee and Said Third Person.

In re Prima Co., 98 F. 2d 952 (C. C. A. 7, 1938);
Chicago Bank of Commerce v. Carter, 61 F. 2d 986;

Jenkinson v. The First National Bank of Sheldon, Iowa, 295 Fed. 778 (C. C. A. 8, 1924);

Evarts v. Eloy Gin Corp., 204 F. 2d 712 (C. C. A. 9, 1953);

Nixon v. Michaels, 38 F. 2d 420 (C. C. A. 8, 1930);

Rodgers v. Chickamauga Trust Co., 253 Fed. 541 (C. C. A. 5, 1918);

- In re Finlay*, 104 Fed. 675 (S. D. N. Y., 1900);
In re Pyrocolor Corp., 46 F. 2d 554 (S. D. N. Y., 1930);
Shor v. McGregor, 108 F. 2d 421, 423-424 (C. C. A. 5, 1939);
Bankruptcy Act, Sec. 2(a)(3) (11 U. S. C. A., Sec. 11(a)(8));
Bankruptcy Act, Sec. 2(a)(21) (11 U. S. C. A., Sec. 11(a)(21));
Bankruptcy Act, Sec. 60(a)(1) (11 U. S. C. A., Sec. 96(a)(1));
Bankruptcy Act, Sec. 70(a)(8) (11 U. S. C. A., Sec. 11(a)(8));
Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975 (C. C. A. 8, 1915);
Bankruptcy Act, Sec. 23(a), (b) (11 U. S. C. A., Sec. 46(a)(b));
Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.04, pp. 450-453;
Duda v. Sterling Mfg. Co., 178 F. 2d 428 (C. C. A. 8, 1949);
In re Italian Cook Oil Corp., 91 Fed. Supp. 72 (D. M. J., 1950);
In re Roman, 23 F. 2d 556 (C. C. A. 2, 1928);
Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.05, p. 481, Note 27;
Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.06(9), pp. 502-503;
Cal. Civ. Code, Sec. 2319, par. 1;
Cal. Civ. Code, Sec. 2330;
Cal. Civ. Code, Sec. 2342;
Cal. Civ. Code, Sec. 2343, subd. 1.

1. The *Bankruptcy Act* defines and limits the authority of the Bankruptcy Courts. The Bankruptcy Courts are of statutory authority. Bankruptcy Courts must find their jurisdiction and powers in the express language of or by implication from the Bankruptcy Act.

In re Prima Co., 98 F. 2d 952 (C. C. A. 7, 1938);
Chicago Bank of Commerce v. Carter, 61 F. 2d 986
(C. C. A. 8, 1932) (rehear. den. 1932);

Taubel-Scott-Kitsmiller Co. v. Fox, 264 U. S. 426,
431, 44 S. Ct. 396, 68 L. Ed. 770 (1924);

In re Kessler, 90 Fed. Supp. 1012, 1015 (S. D.
Calif., 1950);

Kaplan v. Guttman, 217 F. 2d 481 (C. C. A. 9,
1954).

2. If the bankrupt itself had made the payment to the Accountant (Appellant) for the services rendered, and even if it were claimed that such payment was either a preference or a fraudulent transfer, neither the District Court nor the Referee in Bankruptcy thereof would have had or does have summary jurisdiction to recover such preference or the amount of such claimed fraudulent transfer.

Bankruptcy Act, Sec. 60(a)(1), (b) (11 U. S. C.
A., Sec. 96(a)(1), (b));

Bankruptcy Act, Sec. 67(d) (11 U. S. C. A., Sec.
107(d));

In re Roman, 23 F. 2d 556 (C. C. A. 2, 1928);

Duda v. Sterling Mfg. Co., 178 F. 2d 428 (C. C.
A. 8, 1949);

In re Italian Cook Oil Corp., 91 Fed. Supp. 72
(D. N. J., 1950);

Collier on Bankruptcy (14th Ed.), Vol. 2, Sec.
23.06 (9), pp. 502-503.

3. If any payment by the Assignee to the Accountant (Appellant) with whom he contracted for services and to whom he paid the sum involved for such services, all prior to the institution of the bankruptcy proceedings against his Assignor, was recoverable under any circumstances in behalf of the bankruptcy estate, the sole right to institute or prosecute any proceedings therefor was under any circumstances vested in the receiver or trustee of said bankrupt estate and not in the superseded assignee.

Bankruptcy Act, Sec. 23 (11 U. S. C. A., Sec. 46);

Bankruptcy Act, Sec. 2(a)(3) (11 U. S. C. A., Sec. 11(11)(3));

Bankruptcy Act, Sec. 60(b) (11 U. S. C. A., Sec. 96(B));

Bankruptcy Act, Sec. 11(b), (c), (e) (11 U. S. C. A., Sec. 29(b)(c)(e)).

a. The Superseded Assignee was not a party to and had no right to file any Petitions in the Bankruptcy proceedings of his Assignor to determine any controversies between himself and Third Persons, and neither the District Court nor its Referee in Bankruptcy had any jurisdiction of or over the Petition filed by such Superseded Assignee in the bankruptcy proceedings of his Assignor to determine his rights as against or to recover any moneys from a Third Person also not a party to such Bankruptcy proceedings, to wit, the Accountant (Appellant) with whom said Assignee had contracted.

Evarts v. Eloy Gin Corp., 204 F. 2d 712 (C. C. A. 9, 1953);

Nixon v. Michael, 38 F. 2d 420 (C. C. A. 8, 1930);

Rodgers v. Chickamauga Trust Co., 253 Fed. 541 (C. C. A. 5, 1918).

4. Section 2 of the Bankruptcy Act confers jurisdiction upon the courts of the United States sitting in bankruptcy to and only to, with reference to a superseded assignment within four months prior to the date of the bankruptcy, "Require * * * assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property *to deliver the property in their possession or under their control* to the receiver or trustee appointed under this Act * * * and * * * to account to the court for the disposition by them of the property of such bankrupt * * *. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by such * * * assignee * * * either to himself or to others for services and expenses under such * * * assignment * * * and shall, unless such disbursements have been approved upon notice to creditors and other parties in interest by a court of competent jurisdiction prior to the proceeding under this Act, *surcharge such* * * * assignee * * * the amount of any disbursements determined by the court to have been improper or excessive."

Section 70(a)(8) of the Bankruptcy Act does not confer jurisdiction nor expand jurisdiction granted by Section 2(a)(21) thereof, but merely, pursuant thereto, confirms the title of the trustee of the Bankrupt to "*property held by an assignee* for the benefit of creditors appointed under an assignment which constitutes an act of Bankruptcy,

which property shall for the purposes of this Act be deemed to be held by the assignee as the agent of the Bankrupt and shall be subject to the summary jurisdiction of the court." It is only the "*property held by an Assignee*" which is deemed to be held by the Assignee as the agent of the Bankrupt. If a chose in action, a cause of action, exists, it would vest in the trustee, and the trustee could only maintain a plenary action therefor. (Emphasis ours.)

In re Standard Gas and Electric Co., 119 F. 2d 658 (C. C. A. 3, 1941);

Collier on Bankruptcy (14th Ed.), Vol. 2, Sec. 23.05, pp. 480-481;

Harrigan v. Bergdoll, 270 U. S. 560 (1926);

Shor v. McGregor, 108 F. 2d 421, 423-424 (C. C. A. 5, 1939).

a. The Bankruptcy Act, Section 70(a)(8), 11 U. S. C. A., Section 110(a)(8), provides for summary jurisdiction of the Bankruptcy Court to recover property held by the Assignee for the Benefit of Creditors as of the date of the filing of the Petition in Bankruptcy. The Referee in Bankruptcy starting with the premise that the Bankruptcy Court had summary jurisdiction to recover property transferred *after* the date of the Bankruptcy by the Bankrupt without Court authority [Tr. of Rec. p. 28, lines 19-22], then *erroneously assumed* that the Bankruptcy Court therefore had summary jurisdiction to recover property paid before the Bankruptcy without the *approval* of the Bankruptcy Court and therefore the Assignee could file Petitions in the Bankruptcy Proceedings of his Assignor. This is tantamount to saying that the Superseded Assignee for the Benefit of Creditors may,

in the Bankruptcy Court, institute actions by filing Petitions against any persons with whom he dealt during the period of his assignment prior to the Petition for Bankruptcy. In other words, employees such as janitors or secretaries who might perform services for the Assignee as such may discover that they must respond in damages to pay what may be alleged to be excessive remuneration and find that they are limited to a hearing before the Bankruptcy Court. Similarly, suppliers of materials, stationery or other supplies, who receive payment currently with the supplying of the said materials, stationery or supplies, may subsequently find themselves defending in the Bankruptcy Court an action for the recovery of all or part of the sums paid to them when they had contracted with the Assignee for the Benefit of Creditors and delivered such materials, stationery or supplies and received payment pursuant to such contract. No statutory authority supports that result nor the result which the Referee in Bankruptcy and the Court below reached in this case.

The Honorable Judge below, on the other hand, sought to find the authority for the summary jurisdiction here in the case of *In re Rand Mining Co.*, 71 Fed. Supp. 724 (S. D. Calif. 1947). *Rand* concerned, however, the effect of Section 67(a)(1) of the Bankruptcy Act, 11 U. S. C. A., Section 107(a)(1), which involved the invalidity of an attachment lien and the right of the Bankruptcy Court to proceed by summary jurisdiction to hear and determine the rights of any parties under the said attachment lien, which summary jurisdiction is expressly referred by *Bankruptcy Act*, Section 67(a)(4), 11 U. S. C. A., Section 107(a)(4).

And even in the *Rand* case the Referee in Bankruptcy acted upon the Petition of the Trustee in Bankruptcy as

is required by Section 67(a)(4). Thus the reach of Section 67(a)(4) does not extend beyond the provisions of Section 67(a) with reference to liens and furthermore does not provide for affirmative relief to one other than the Trustee or the debtor.

The Honorable Judge below, reading pertinent parts of *Rand* into the record [Rep. Tr. p. 6, lines 7-26; pp. 8-10, lines 1-10], failed to understand that in the case now before this Court the claim was by the Superseded Assignee for the Benefit of Creditors. It was not a "claim for expenses which had to be approved before any was due" as the Honorable Court below stated [Rep. Tr. p. 10, lines 2-3]; neither the *Rand* case nor the analogy of the Honorable Court below supports the conclusion reached by that Court.

The limitation of Section 67 of the Bankruptcy Act, which recognized the exercise of summary jurisdiction with respect to voidable liens, was established in a case following *Rand* and which distinguished it. In *City and County of Denver v. Warner*, 169 F. 2d 508 (C. C. A., 10, 1948), the Court stated that although the 1938 amendment to the Bankruptcy Act treated taxes as statutory liens under Section 67 of the Bankruptcy Act, it significantly omitted to grant summary jurisdiction to determine questions arising as to the amount and legality of taxes owing to the United States, or to any State or subdivision thereof, under Section 64, subsection (a) of the Bankruptcy Act. Therefore, the Bankruptcy Court had no summary jurisdiction and could not acquire summary jurisdiction by ordering property taken pending decision on the question of its jurisdiction. Having wrongfully taken possession of the property it was ordered to be surrendered to the adverse claimant.

So also in this case, no statutory authority existing for summary jurisdiction, the Court cannot find its summary jurisdiction in the order of the Court surcharging the Assignee. (*Bankruptcy Act*. Sec. 2(a)(21), 11 U. S. C. A. Sec. 11(a)(21).)

The distinction between the jurisdiction over the Superseded Assignee and over the Third Persons was characterized in *In re McCrum*, 214 Fed. 207, 209 (C. C. A., 2, 1941):

“A trustee in bankruptcy, who has been appointed within four months of the general assignment made by a debtor for the benefit of his creditors, has a right to obtain an order from the bankruptcy court, and in a summary proceeding, compelling the assignee to submit his accounts and to turn over to him all money and property in his hands, which belong to his assignor. No plenary suit is necessary in a case of that sort. The assignee under such conditions is not an adverse claimant, but merely the agent of the assignor for the distribution of the proceeds of the property, and as such agent, his possession is that of the principal. He is a mere naked bailee for the creditors and has no right to retain the possession as against the trustee in bankruptcy.”

The description of the scope of the summary jurisdiction as outlined in the *McCrum* case evidences the limitation of that jurisdiction. The key phrases in the foregoing opinion are “money and property in his hands” and “the Assignee under such conditions is not an adverse claimant.” Therefore, in order for the summary jurisdiction to be exercised as against the Assignee for the Benefit of Creditors, the property must be in the hands of the Assignee at the time of the filing of the Petition and the respondent must not be in the position of an

adverse claimant or a third person stranger to the Bankruptcy.

Here, the funds were not in the hands of the Assignee for the Benefit of Creditors but, prior to the Bankruptcy, had already been paid to the Appellant in payment of its services. Appellant does not hold this money as an agent for either the Bankrupt, the Assignee for the Benefit of Creditors or for any other person connected with the Bankrupt of his Estate. The amendment of 1938 to the Act of Section 2(a)(21) provides for surcharging a Superseded Assignee who fails to account for disbursements for fees or expenses from the Bankrupt's Estate prior to the date of Bankruptcy. The filing of the Bankruptcy petition within four months thereby rendered nugatory, as of that time, the assignment for the benefit of creditors. The property at that time held by the Assignee is the property of the Bankrupt and is succeeded to by the Trustee. It being therefore the property of the bankrupt estate and the Trustee being entitled to possession, the amendment was designed to avoid a plenary suit against the Assignee or an action on the Assignee's Bond. The Assignee himself, therefore, is charged with notice by the statute that in his transactions he must, in so far as services are rendered for the benefit of the Bankrupt's Estate, protect himself by whatever agreement, if any, he can make with the persons with whom he contracts.

The decision herein will destroy the using of Common-Law Assignments for Benefit of Creditors, for no person—even though no Bankruptcy is pending—will be willing to contract with an Assignee if, notwithstanding such Contract, in the event of a Superseding Bankruptcy, the Bankruptcy Court will have summary jurisdiction to re-evaluate, redetermine, the reasonableness of the Contract

between the Assignee and such Third Person. For example: Assume that an Assignee for Benefit of Creditors is operating for purposes of liquidation a business. He needs steel, services of various persons, merchandise, the rental or use of equipment and everything else which is required to operate and liquidate the business. No merchant, no manufacturer, no person performing services, no purveyor could, in an arm's-length transaction, contract with the Assignee, for he would always be subject to the second guessing of the Referee. The manufacturer wants a certain price for his merchandise which the Assignee needs; the Assignee can buy it no cheaper, and the Assignee in good faith contracts for and pays for the merchandise, but the Referee, second guessing and disagreeing with the Assignee, and believing that the merchant is getting too high a price for his merchandise, would then seek to recover from the merchant the portion which the Referee believes to be improper or excessive, and this notwithstanding the bona fide arm's-length negotiations and Contract between the Assignee and the Third Person.

If an Assignee in bad faith makes expenditures, pays improper, excessive amounts, he should be liable and he should be surcharged therefor, but if the Assignee in good faith and in the exercise of reasonable care enters into a Contract, then he should not be subject to the second guessing, the soothsaying, the economic opinions, of the Referee. Under no circumstances has the Bankruptcy Act conferred jurisdiction on the Referee to recover summarily from the supplier, the merchant, the manufacturer, who in good faith entered into the Contract with the Assignee, the amount received which the Referee believes to be excessive notwithstanding the Contract.

The procedure followed, if it is to be the pattern for such proceedings is akin to a "Kangaroo Court"; the Referee having first surcharged the Assignee as having paid—though in good faith—too high a price to John Doe for his services or his merchandise, then summarily cites before him John Doe to show cause why he should not repay to the Bankrupt Estate the same amount which the Referee has already adjudged, in a proceeding to which John Doe was not a party, was excessive. It is humanly impossible for John Doe to receive the type of hearing which due process entitles him to, for the very Referee who is going to hear the matter summarily has already adjudged that he (John Doe) charged too much for his services or materials, as the case may be.

In the Matters of Murchison and White, 349 U. S. 133, 99 L. Ed. Adv. 551, 75 S. Ct. 623 (1955).

This Court can take judicial notice of the fact that there are more Arrangements and Compositions and Extensions with Creditors handled outside of the Bankruptcy Court throughout our United States than are handled through the Bankruptcy Courts, for it is believed by creditors generally that the costs of handling of non-judicial Assignments, Extensions and Compositions is less than the costs through bankruptcy proceedings. Assignments for Benefit of Creditors are widely used. In California, the type used is the Common-Law Assignment. [See *Brainard v. Fitzgerald*, 3 Cal. 2d 157, 44 P. 2d 336 (1935).] The Decision herein makes impractical and economically impossible the use thereof.

Here the affirmative relief sought by the Superseded Assignee and ordered by the Referee and approved by the Court below is the repayment of money by the Appellant

on the Petition of the Superseded Assignee. The Assignee has been surcharged for the money, which he presumably is now obligated to pay. The dispute is therefore between the Assignee and the Appellant. A Bankruptcy Court does not have jurisdiction to litigate disputes between persons not party to the Bankruptcy proceedings.

In re Pyrocolor Corp., 46 F. 2d 554 (S. D. N. Y., 1930).

In the *Pyrocolor Corp.* case, the Court held that it had no jurisdiction over a Petition by an attorney who was not a party to the Bankruptcy proceedings to direct the Trustee to pay to him directly sums which would otherwise be paid certain creditors.

The Bankruptcy cannot be used to litigate differences between strangers to the Estate and the Creditors. Thus, by analogy, the Assignee, apparently a debtor to the Estate, cannot litigate his claim against a stranger to the Bankruptcy proceedings. The burden to repay, in so far as the Bankruptcy Court is concerned, is on the Assignee for the Benefit of Creditors. It is beyond the summary jurisdiction of the Bankruptcy Court to award affirmative relief to the Assignee against the adverse claimant.

5. The Bankruptcy Court had no jurisdiction of or over the Petition of the Superseded Assignee and the objection to the jurisdiction of the Bankruptcy Court by the Appellant was not waived by it.

The Appellant has, in his written objections, and orally before the Referee, made timely objection to the jurisdiction of the Referee to hear this matter as a summary proceeding or at all.

These objections appear on the records and transcript before this Court. [Tr. of Rec. pp. 23-25; p. 26, lines

21-24; p. 30, lines 16-20; p. 35, lines 6-7; pp. 36-38; p. 43, lines 16-19.]

The records of the proceedings showing timely objections to jurisdiction is an effective answer to any implication of consent arising from the Appellant's contest of the cause upon the merit.

Stiefel v. 14th Street and Broadway Realty Corp.,
48 F. 2d 1041 (C. C. A. 2, 1931) rehear. den.
(1931).

Conclusion.

The principles involved herein are of great importance not only to and as to the rights of Appellant and all other persons who may contract in good faith with an Assignee for the Benefit of Creditors prior to the filing of any Bankruptcy Petition against his Assignor and not only to the enabling of debtors and creditors to agree through Assignments for Benefit of Creditors as to Extensions or Compositions or otherwise, but as well to the very administration of our Courts of justice. It is the effect of the Decision herein that not only is every Contractee who enters into a Contract either for merchandise or services with an Assignee for Benefit of Creditors unable to know whether his Contract is valid or not, unable to price or value either his merchandise or services, because of the review thereof by a Referee in Bankruptcy in the event of a subsequent adjudication in Bankruptcy of the Assignor, but additionally is subject to the prejudging of his Contract, and the value of his merchandise or his services by the very Referee who already and theretofore had adjudged the validity of his contract and the value of his merchandise or services by the hearing on the petition under which the Assignee is first surcharged. The effect of the Decision of the Lower Court is to impair the valid-

ity of Contracts; the effect of the Decision of the Lower Court is to deny to a person who in good faith contracts with an Assignee the right of trial by jury and the right of trial in the normal processes, as due process is known, before a Judge who has not prejudged the merits of his case before the hearing thereof.

It was never the intent of the Amendment to either Section 2(a)(21) or Section 70(a) to deny or deprive a person contracting in good faith with an Assignee for the Benefit of Creditors of his inherent, his constitutional, rights, his rights of due process.

It is respectfully submitted that the said Orders of the Referee and the United States District Court should be reversed.

Respectfully submitted,

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